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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA
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8 UNITED STATES OF AMERICA,

Case No. 2:10-cr-00448-LDG-RJJ

9 Plaintiff,

10 v.

11 FERNANDO ARRELLANO-ESPINOZA,

ORDER

12 Defendants.
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14 A criminal indictment was returned against Defendant Fernando Arrellano-Espinoza on
15 September 8, 2010, charging him with Unlawful Reentry of a Deported Alien in violation of 8
16 U.S.C. § 1326. In May 2009, Defendant admitted to U.S. Immigration and Customs Enforcement
17 that he was a citizen of Mexico, signed a Stipulated Request for Removal and Waiver of Hearing,
18 and was deported without a hearing on May 26, 2009. Defendant has now filed a Motion to
19 Dismiss Based on a Prior Unlawful Deportation (#16, response #17, reply #18).

20 A collateral attack on the underlying deportation can succeed where the alien shows that
21 his due process rights were violated in his prior deportation proceeding and that he suffered
22 prejudice as a result of such violation. *United States v. Ramos*, 623 F.3d 680 (9th Cir. 2010);
23 *United States v. Gonzalez-Valerio*, 342 F.3d 1051, 1054 (9th Cir. 2003) (citing *United States v.*
24 *Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000)). Defendant argues that his due process rights were
25 violated when the immigration judge failed to inform him that he was ostensibly eligible for
26 voluntary departure under 8 U.S.C. § 1229c(a)(1). The duty of the immigration judge to inform an
alien of his eligibility for relief is mandatory, and the failure to do so constitutes a violation of the

1 alien's due process rights. *Id.* (citing *United States v. Muro-Inclan*, 249 F.3d 1180, 1183-84 (9th
2 Cir. 2001)). The court need not address whether the information given Defendant adequately
3 protected his due process rights in this case, however, because Defendant is unable to demonstrate
4 that he was prejudiced by any such failure. *See id.*

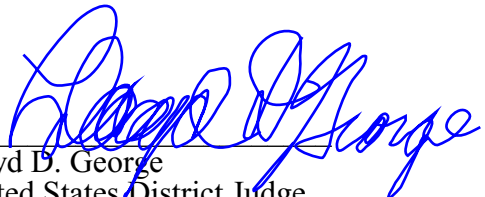
5 In order to successfully challenge his deportation order, Defendant must establish that he
6 was prejudiced by the failure of the immigration judge to inform him of the potential for
7 discretionary relief. *Id.* (citing *United States v. Alvarado-Delgado*, 98 F.3d 492, 493(9th Cir.
8 1996) (en banc). To demonstrate prejudice, Defendant does not need to show that he actually
9 would have been granted relief; instead, he must only show that he had a "plausible" ground for
10 relief. *United States v. Muro-Inclan*, 249 F.3d 1180, 1183 (9th Cir. 2001). However, if the
11 defendant is "barred from receiving relief, his claim is not plausible." *United States v. Ramos*, 623
12 F.3d 672, 684 (9th Cir. 2010) (citation and internal quotations omitted).

13 Defendant cannot establish that he was prejudiced because his 2007 conviction for assault
14 with a deadly weapon under NRS § 200.471 barred him from relief under 8 U.S.C. § 1229c(a)(1).
15 Assault with a deadly weapon under NRS § 200.471 is a crime of violence, *see* 8 U.S.C. §
16 1101(a)(43)(F); *Camacho-Cruz v. Holder*, 621 F.3d 941, 943 (9th Cir. 2010), and so precludes
17 relief by voluntary departure, *see* 8 U.S.C. § 1229c(a)(1). Therefore, because Defendant cannot
18 demonstrate that he was prejudiced by the immigration judge's failure to inform him of the
19 possibility of relief by voluntary departure, his collateral attack on his prior deportation proceeding
20 necessarily fails. *See United States v. Soto-Castelo*, 621 F. Supp. 2d 1062, 1072-73 (D. Nev.
21 2008); *see also United States v. Garcia-Gomez*, No. 2:10-cr-00080-RCJ-RJJ, 2010 WL 2776079
22 (D. Nev. July 14, 2010). Accordingly,

23 THE COURT HEREBY ADOPTS the magistrate judge's report and recommendation
24 (#19) and ORDERS that Defendant's motion to dismiss (#16) is DENIED.

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1 Dated this 13 day of May, 2011.
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Lloyd D. George
United States District Judge